Feb. 17 - New argument ordered for Friday March 2 - Feb 26 postponed to Friday Mar 9.

SUPREME COURT OF THE UNITED STATES.

No. 6.—Original.

EX PARTE: IN THE MATTER OF A. H. GARLAND, OF ARKANSAS, PETITIONER.

PETITION FOR LEAVE TO PRACTICE IN SUPREME COURT OF THE UNITED STATES, WITHOUT TAKING THE OATH PRESCRIBED FOR ATTORNEYS BY ACT OF CONGRESS OF 24TH OF JANUARY, A. D. 1865.

To the Hon. the Supreme Court of the United States:

December term, A. D. 1865.

Your petitioner, A. H. Garland, of the city of Little Rock, State of Arkansas, would respectfully state and show that on the 26th day of December, A. D. 1860, at a term of this court, your petitioner was duly sworn as an attorney of this court, and admitted to practice as such, and a license in due form for that purpose was on said day issued to him, which he has in his possession, subject to the inspection of the court, as the same will appear by reference to the records of the court; and accordingly petitioner did appear at such term of this court, and file with the clerk his brief and argument, signed by himself and Reverdy Johnson, in a case then pending in this court, No. 189, and styled McGehee *vs.* M. R. P. Mathis, &c., on writ of error to the supreme court of Arkansas, the same to be presented to and read by the court, when said cause was reached regularly on the docket; and at the same term he made out and prepared in his own name, as attorney for the plaintiffs in error, briefs and arguments in the following cases, viz: No. 190, Jackson *et al. vs.* Mathis; No. 191, Montgomery *vs.* same; No. 195, Bowling *vs.* same; No. 193, Wilson *vs.* same; No. 194, Charles C. McDermott *vs.* same; and No. 195, Charles McDermott *vs.* same, and left the same with the

2 clerk of the court to be presented and used as the argument in the case of McGehee *vs.* Mathis, hereinbefore mentioned, and in the case of Harding's executors *vs.* Duncan *et al.*, No. 270, at December term, 1860, petitioner was retained for the defendants in error in this court, and so entered his name at the term aforesaid, with a view of arguing the same when reached on the docket; and in the last-named suit, the fee of petitioner had been before such time fully paid off and discharged; and the fee in the case of McGehee *vs.* Mathis, &c., had been likewise paid to petitioner in case the same should not be recovered, which was the sum of five hundred dollars ($500) for this court, and the fees in the other cases had been partially paid to petitioner.

Petitioner would further state and show that each and all of the cases aforesaid still remain undecided in this court, for reasons to be more fully noticed hereafter in this petition, and they now stand on the docket in their respective order, as follows, to wit, 28, 29, 30, 31, 32, 33, 34 and 58, and he supposes said causes will be called at an early day of this term for argument and submission. And your petitioner comes and asks, and claims the right, to appear as counsel in said causes, and to argue the same pursuant to his original understanding in the same, and here avers he is ready and willing to attend to the same in the order in which they stand upon the docket.

3 Petitioner would further state and show that after his admission to practice in this court as aforesaid, on the 6th day of May, A. D. 1861, the State of Arkansas, of which he was then and is now a citizen, in convention passed an ordinance of secession, which purported to withdraw the said State from the United States,

and afterwards, by an ordinance of the same convention, said State attached herself to the so-called Confederate States, then in war and rebellion against the United States; and the said State being received into the so-called government of the Confederate States of America, by an act of its congress of May 18, A. D. 1861, she remained with it and shared its fate throughout.

During the rebellion, as aforesaid, your petitioner was a member of the provisional congress of the so-called Confederate States from the State of Arkansas, and afterwards a member of the lower house of congress of the first and second congress, under what was known and called the permanent government of the so-called Confederate States, and finally a member of the senate of the so-called Confederate States; which last-named position he held at the time of the surrender of the forces of such Confederate States under General Robert E. Lee, Joseph E. Johnston, and others of the confederate generals, and because of such positions, so by him held as aforesaid, and for nothing else, he was liable to the pains, penalties, and forfeitures incident to and consequent upon acts of treason against the
4 United States; and being so liable he applied to his Excellency Andrew Johnson, President of the United States, in a petition stating his acts during the said rebellion, verified by him in due form of law, on the 15th day of July, A. D. 1865, for a full pardon and amnesty for all offences by him committed in said rebellion, and the President, after consideration thereof, did grant to your petitioner, over his signature and the seal of the United States, duly signed by William H. Seward, Secretary of State of the United States, a full pardon and amnesty as prayed for, which pardon was on said day delivered to your petitioner, and by him received and accepted, and the oath of amnesty taken by him and attached to said pardon, and a copy thereof, together with a notice that your petitioner had accepted such pardon as granted, were deposited in the office of the Secretary of State aforesaid, at Washington city, D. C., and said pardon, with the oath of amnesty aforesaid attached, was filed in the office of the recorder of the county of Pulaski, State of Arkansas, the place of residence of your petitioner now, and for the past nine years, on the 31st day of July, A. D. 1865, and the same was there recorded, all of which will appear by reference to said original pardon, the oath of amnesty thereto attached, and the certificate of record, which are in the hands of petitioner, subject to the order of the court, and
5 true copies of which are hereto attached and marked "Exhibit X 1," and made part hereof.

Your petitioner would further state and show that before the granting of such pardon he was indicted in the United States district court for the eastern district of Arkansas for treason against the United States, and said indictment has been transferred to the circuit court for such district for trial; and before the granting of such pardon a libel of seizure, confiscation and condemnation, had been filed in said district court at Little Rock, by and on behalf of the United States, against the property of your petitioner, and to both said libel and indictment your petitioner appeared at a term of such

courts held respectively in October, 1865, and filed his plea in bar, setting forth the pardon aforesaid, and averments that he had complied with all and singular the conditions of such pardon; and to such plea, in both cases, the United States filed for demurrer; and the court, after consideration thereof, overruled said demurrer; and the United States not replying to said pleas your petitioner was discharged from said indictment, and the property seized under such libel was ordered to be discharged from the same and to be returned to petitioner upon petitioner paying all the costs accrued thereunder; all of which is of record in said courts, true and perfect copies whereof are herewith filed, marked Exhibits X 2 and X 3, and part here-
6 of. And he avers the costs of such proceedings he fully paid off and discharged, the same amounting to $61 30 in the proceedings for confiscation, and $28 in the proceedings under the indictment, and took the receipt of the clerk of said district court therefor, a copy of which is herewith filed, marked Exhibit X 4, and part hereof, the original being in possession of petitioner, subject to the order of the court. And petitioner avers that the proceedings aforesaid are all that have been instituted against either his person or his property, so far as he is advised or has any information, and besides having paid the costs as aforesaid, and notified the Secretary of State, as herein before charged, of his acceptance of such pardon, he has not since the granting of the same, nor for some time before that, owned any property in slaves, nor used slave labor in any manner, nor does he expect or intend to do so for the future, and he avers he has complied with each and every condition of such pardon.

And your petitioner would further state that the Congress of the United States, by act of July 2d, 1862, (12 Statutes at Large, p. 502,) prescribed the following oath to be administered to all officers of the United States, viz:

"I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States, since I have been a citizen thereof, that I have voluntarily given no aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or
7 pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that to the best of my knowledge and ability I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God!"

And afterwards, on the 24th day of January, A. D. 1865, the Congress by supplementary act (38th Congress, 2d session, chap. 20, p. 424) provided that no person, after the date thereof, (24th January, 1865,) should be admitted to practice in the Supreme Court of the

United States, and after the 4th day of March, 1865, in any district or circuit court of the United States, or Court of Claims, even if previously admitted as an attorney of such courts, unless he should take the oath prescribed in the act of July 2d, 1862, aforesaid.

Petitioner would further state and show that ever since the October term, A. D. 1856, of the district court of the United States for the eastern district of Arkansas, until the breaking out of the rebellion aforesaid, he has practiced in said court and the circuit court for such district, and has, during that time, had a lucrative practice in such
8 courts, worth, at least, the sum of two thousand dollars annually, and besides the cases hereinbefore named, pending in this court, he has been retained as counsel in several others that are to come before this court, involving grave questions and large amounts of property and money, and the fees to him would be worth, at least, fifteen hundred dollars, if permitted to attend to the same.

Since the granting of his pardon as aforesaid he has been refused and denied the right of practicing in the United States courts for Arkansas, notwithstanding he has applied to do so, and notwithstanding persons have sought his advice and services in said courts, and he has been compelled to decline all such applications because of the oath aforesaid, which he could not take without committing perjury, and without taking the same, the judge of such courts would not permit (but refused) your petitioner to practice in the same, to the great loss and injury of your petitioner.

Your petitioner would further show that under and by virtue of an act of the Congress of the United States, and an act amendatory thereof, approved June 30th, 1864, and March 3d, 1865, which, among other things, taxes lawyers ten dollars for each licence, and defines who are lawyers, your petitioner applied to the collector of revenue for the United States for the 1st collection district of Arkansas, on the 12th day of October, A. D. 1865, and tendered his tax of ten dollars for a licence to practice law, and the same was received by said collector and a licence granted to your petitioner, which he has in his possession, subject to the order of the court, a true copy
9 of which is hereto attached, marked Exhibit X 5 and part hereof; and petitioner charges that in and by said act a lawyer is defined to be "every person who for fee or reward shall prosecute or defend causes in any court of record or other judicial tribunal of the United States or any of the States, or give legal advice in relation to any cause or matter whatever."

Petitioner avers that but for the rebellion aforesaid he would have been in regular attendance upon this court to have completed his undertakings and contracts in the cases now pending here, in which he is of counsel, viz: Nos. 28, 29, 80, 31, 32, 33, 34, and 58; and he is advised and believes the truth to be, and so avers, that because of said rebellion, and the absence of counsel in such cases, the suits just named, as well as all the suits from any and all the States that embarked in such rebellion, pending in this court at the December term, A. D. 1860, and that remained at the end of such term undecided, have been continued from term to term until this time.

And now, at the first term of this court since the termination of such rebellion, your petitioner comes to discharge the duties by him assumed heretofore as an attorney of this court, but if he is compelled to take the oath aforesaid he will not be able to practice in this court and must surrender a right valuable in a pecuniary point of view and otherwise much prized by him; but he is advised that the law directing such oath to be taken by attorneys, &c., is null and void because it is repugnant to the Constitution of the United States; and if it be not in violation of the Constitution of the United States, he avers the pardon granted him by the President, as hereinbefore set forth, relieves him from the taking of such oath and allows him to practice in this court without taking the same, and more especially is this true since by his licence, hereinbefore mentioned, Exhibit X 5, hereto, he is allowed "to carry on the business or occupation of a lawyer," &c., &c. And petitioner avers that he is advised, and he believes it true, and so states, that his name has never been erased from the roll of attorneys of this court, but, on the contrary, it still stands and remains on the list of attorneys of this court as before the rebellion.

Wherefore he prays that he be allowed to be and continue an attorney of this court and to practice as such without taking the oath as prescribed by acts of Congress of July 2d, 1862, and of January 24th, 1865, as aforesaid, as he will, &c., &c., &c.

Respectfully, &c.,

A. H. GARLAND.

STATE OF ARKANSAS, *Eastern District of U. S.:*

I, A. H. Garland, above named, do state on oath that the facts set forth in the foregoing petition are true, so help me God.

A. H. GARLAND.

Subscribed and sworn to before me, clerk of the district court of U. S. for the district aforesaid, this Oct'r 23, '65. Witness my hand as such and seal of my office, at Little Rock, Arkansas.

[SEAL.] CHAS. P. REDMOND,
Clerk U. S. Circuit Court, East. Dist. Ark.

Exhibit X 1.

Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting :

Whereas A. H. Garland, of Little Rock, Arkansas, by taking part in the late rebellion against the government of the United States has made himself liable to heavy pains and penalties; and whereas the circumstances of his case render him a proper object of executive clemency : Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant to the said A. H. Garland a full pardon and amnesty for all offences by him committed arising from participation,

direct or implied, in the said rebellion, conditioned as follows, viz: this pardon to begin and take effect from the day on which the said A. H. Garland shall take the oath prescribed in the proclamation of the President dated May 29th, 1865, and to be void and of no effect if the said A. H. Garland shall hereafter at any time acquire
12 any property whatever in slaves, or make use of slave labor, and that he first pay all costs which may have accrued in any proceedings hitherto instituted against his person or property. And upon the further condition that the said A. H. Garland shall notify the Secretary of State in writing that he has received and accepted the foregoing pardon.

In testimony whereof, I have hereunto signed my name and caused the seal of the United States to be affixed. Done at the city
[SEAL.] of Washington this fifteenth day of July, A. D. 1865, and of the independence of the United States the ninetieth.

By the President:

ANDREW JOHNSON.

WILLIAM H. SEWARD, *Secretary of State.*

UNITED STATES OF AMERICA:

I, A. H. Garland, of the county of Pulaski, State of Arkansas,
13 do solemnly swear in presence of Almighty God that I will henceforth faithfully support, protect, and defend the Constitution of the United States and the union of the States thereunder, and that I will in like manner abide by and faithfully support all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves, so help me God.

A. H. GARLAND.

Subscribed and sworn to before me this 17th day of July, A. D. 1865.

[SEAL.] A. TINSHALL WELCH, *Notary Public.*

DISTRICT OF COLUMBIA, *City and County of Washington ss:*

I, A. Tinshall Welch, a notary public in and for the District of Columbia, do hereby certify that the foregoing is a true copy of an original oath of allegiance subscribed and sworn to before me this 17th day of July, 1865.

A. TINSHALL WELCH.

14 THE STATE OF ARKANSAS, *County of Pulaski, sct:*

I, John W. Jay, clerk of the circuit court and ex officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 31st day of July, A. D. 1865, and the same is now duly recorded in record book "A," page 249, &c.

In testimony whereof, I, John W. Jay, clerk of said circuit court, have hereunto set my hand and affixed the seal of said court, at my office this 3d day of August, A. D. 1865.

[SEAL.] JOHN W. JAY,

Clerk, ex officio Recorder.

15 *Exhibit X 2.*

Be it remembered that at a term of the United States circuit court for the eastern district of Arkansas, begun and holden at Little Rock, Arkansas, on the second Monday of April, A. D. 1865, and continued on the second Monday of October, A. D. 1865, the following pleas and proceedings were had, to wit:

* * * * * * * * *

UNITED STATES.
vs.
AUGUSTUS H. GARLAND. } Indictment for treason.

This day came the United States, by O. Jennings, esq., district attorney, and the said defendant, Augustus H. Garland, was brought to the bar of the court in custody of the marshal, and being raigned entered and filed his plea of pardon to the judgment against him by the grand jury of the United States for treason up that he has received a special charter of pardon from the President of the United States, dated the 15th day of July, A. D.
16 1865, pardoning him of and for the offences mentioned in said indictment, and prays that he may go hence without day. To which plea the United States, by her attorney, interposes and files her general demurrer, and the court, after due consideration of said plea and demurrer, finds and considers that said plea is good and sufficient in law in bar of this prosecution; and the attorney for the United States standing upon said demurrer and failing to reply or answer further to said plea, it is therefore considered and ordered that said defendant, Augustus H. Garland, go hence without day, and that said defendant pay all costs of this prosecution and that execution issue therefor. * * * * * * *

I, Charles P. Redmond, clerk of the U. S. circuit court for the eastern district of Arkansas, hereby certify that the foregoing is a correct and compared copy the order of said dismissing the indictment against Augustus H. Garland.

17 Witness my hand and the seal of said court this 21st day of October, A. D. 1865.

[SEAL.] CHARLES P. REDMOND, *Clerk.*

I further certify that the costs of the above mentioned prosecution have been paid by said Garland.

[SEAL.] CHARLES P. REDMOND, *Clerk.*

Exhibit X 3.

18 Be it remembered that at a term of the United States district court in and for the eastern district of Arkansas, begun and holden at the city of Little Rock, Arkansas, on the first Monday in October, A. D. 1865, among other things the following pleas and proceedings were had, to wit:

direct or implied, in the said rebellion, conditioned as follows, viz: this pardon to begin and take effect from the day on which the said A. H. Garland shall take the oath prescribed in the proclamation of the President dated May 29th, 1865, and to be void and of no effect if the said A. H. Garland shall hereafter at any time acquire
12 any property whatever in slaves, or make use of slave labor, and that he first pay all costs which may have accrued in any proceedings hitherto instituted against his person or property. And upon the further condition that the said A. H. Garland shall notify the Secretary of State in writing that he has received and accepted the foregoing pardon.

In testimony whereof, I have hereunto signed my name and caused the seal of the United States to be affixed. Done at the city
[SEAL.] of Washington this fifteenth day of July, A. D. 1865, and of the independence of the United States the ninetieth.

By the President:

ANDREW JOHNSON.

WILLIAM H. SEWARD, *Secretary of State.*

UNITED STATES OF AMERICA:

I, A. H. Garland, of the county of Pulaski, State of Arkansas,
13 do solemnly swear in presence of Almighty God that I will henceforth faithfully support, protect, and defend the Constitution of the United States and the union of the States thereunder, and that I will in like manner abide by and faithfully support all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves, so help me God.

A. H. GARLAND.

Subscribed and sworn to before me this 17th day of July, A. D. 1865.

[SEAL.] A. TINSHALL WELCH, *Notary Public.*

DISTRICT OF COLUMBIA, *City and County of Washington ss:*

I, A. Tinshall Welch, a notary public in and for the District of Columbia, do hereby certify that the foregoing is a true copy of an original oath of allegiance subscribed and sworn to before me this 17th day of July, 1865.

A. TINSHALL WELCH.

14 THE STATE OF ARKANSAS, *County of Pulaski, sct:*

I, John W. Jay, clerk of the circuit court and ex officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 31st day of July, A. D. 1865, and the same is now duly recorded in record book "A," page 249, &c.

In testimony whereof, I, John W. Jay, clerk of said circuit court, have hereunto set my hand and affixed the seal of said court, at my office this 3d day of August, A. D. 1865.

[SEAL.] JOHN W. JAY,

Clerk, ex officio Recorder.

15 *Exhibit X 2.*

Be it remembered that at a term of the United States circuit court for the eastern district of Arkansas, begun and holden at Little Rock, Arkansas, on the second Monday of April, A. D. 1865, and continued on the second Monday of October, A. D. 1865, the following pleas and proceedings were had, to wit:

* * * * * * * * *

UNITED STATES.
vs.
AUGUSTUS H. GARLAND. } Indictment for treason.

This day came the United States, by O. Jennings, esq., district attorney, and the said defendant, Augustus H. Garland, was brought to the bar of the court in custody of the marshal, and being duly arraigned entered and filed his plea of pardon to the judgment preferred against him by the grand jury of the United States for treason, setting up that he has received a special charter of pardon from the President of the United States, dated the 15th day of July, A. D.
16 1865, pardoning him of and for the offences mentioned in said indictment, and prays that he may go hence without day. To which plea the United States, by her attorney, interposes and files her general demurrer, and the court, after due consideration of said plea and demurrer, finds and considers that said plea is good and sufficient in law in bar of this prosecution; and the attorney for the United States standing upon said demurrer and failing to reply or answer further to said plea, it is therefore considered and ordered that said defendant, Augustus H. Garland, go hence without day, and that said defendant pay all costs of this prosecution and that execution issue therefor. * * * * * * *

I, Charles P. Redmond, clerk of the U. S. circuit court for the eastern district of Arkansas, hereby certify that the foregoing is a correct and compared copy the order of said dismissing the indictment against Augustus H. Garland.
17 Witness my hand and the seal of said court this 21st day of October, A. D. 1865.

[SEAL.] CHARLES P. REDMOND, *Clerk.*

I further certify that the costs of the above mentioned prosecution have been paid by said Garland.

[SEAL.] CHARLES P. REDMOND, *Clerk.*

Exhibit X 3.

18 Be it remembered that at a term of the United States district court in and for the eastern district of Arkansas, begun and holden at the city of Little Rock, Arkansas, on the first Monday in October, A. D. 1865, among other things the following pleas and proceedings were had, to wit:

TUESDAY MORNING, *October* 18*th*, 1865.

Court met pursuant to adjournment. Present: Hon. Henry C. Caldwell, judge.

* * * * * *

UNITED STATES,
vs.
Lots 2, 3, *et al.*, property of
AUGUSTUS H. GARLAND.

And now this day this case coming on for hearing on the libel of information and the answer and plea of pardon of the claimant, the United States appearing by Orville Jennings, their attorney, and the claimant, Augustus H. Garland, appears in propria persona, and by agreement of parties this cause is submitted to the
19 court; and the court having heard and considered the evidence, and being fully advised in the premises, finds that on the fifteenth day of July, A. D. 1865, his Excellency Andrew Johnson, President of the United States, did grant, execute and deliver to the said claimant, Augustus H. Garland, a charter of pardon, which, in the opinion of the court, operates, upon the payment of costs, to discharge the property of said claimant from the operation and effect of the confiscation act when pleaded before final decree of condemnation; and it appearing to the court that said claimant, Augustus H. Garland, has complied with the several conditions upon which his said pardon was granted, and has paid all costs that have accrued in this case, it is therefore ordered, sentenced and decreed, that the libel in this case be, and the same is hereby, dismissed; and it is further ordered, sentenced and decreed, that the marshal surrender to said claim-
20 ant, Augustus H. Garland, the possession, custody and control of said property in the libel mentioned. * * *

I hereby certify that the foregoing is a true extract from the records of said court.

Witness my hand and the seal of the United States district court for the eastern district of Arkansas.

[SEAL.]

CHAS. P. REDMOND,
Clerk U.S. Dist. Court.

I further certify that the costs in the above mentioned case have been paid by said Augustus H. Garland.

CHARLES P. REDMOND, *Clerk.*

21 *Exhibit X* 4.

District Court of the United States for the Eastern District of Arkansas.

UNITED STATES,
vs.
The property of AUGUSTUS H. GARLAND. } No. 9.

Costs :

District Atty's docket fee	$20 00
Clerk's costs	16 00
Marshal's costs	25 00
	61 30

Against person :

District att'y	$5 00
Clerk's costs	2 15
	7 15
To amount omitted	20 85
	28 000
Total costs	79 30

Received payment.

CHAS. P. REDMOND, *Clerk.*

Exhibit X 5.

22 By authority of the United States, to all whom it may concern :

No. 43.] (Internal revenue license. In force from May 1st, 1865, to May 1st, 1866.)

This license is granted to Augustus H. Garland, of the city of Little Rock, in the county of Pulaski and State of Arkansas, to carry on the business or occupation of lawyer, at Markham street in the aforementioned place, he having paid the tax of ten dollars therefor, conformably to the provisions of an act entitled, "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, and the amendments thereto.

This license to be in force until the first day of May, 1866, provided the holder thereof shall conform to the requirements of said act, and of such other act or acts as are now, or may hereafter be, in this behalf enacted. Given under my hand and seal at Little Rock this, 12th day of October, A. D. 1865.

[SEAL.] WILLIAM J. PATTON,
Collector of the 1st Collection District, State of Arkansas.

Filed November 2, 1865.

REC. 6—2

13

Supreme Court of the United States.

No. 6.—ORIGINAL.

EX PARTE:

IN THE MATTER OF A. H. GARLAND.

Petition for leave to practice as an Attorney and Counsellor of this Court without taking the test oath prescribed by the Act of Congress of January 24, 1865.

REVERDY JOHNSON,
MATT. H. CARPENTER,
Counsel for Petitioner.

Jos. L. Pearson, printer, 511 Ninth street.

Supreme Court of the United States.

No. 6.—Original.

EX PARTE:
IN THE MATTER OF A. H. GARLAND.

Petition for leave to practice as an Attorney and Counsellor of this court, without taking the oath prescribed by the Act of Congress, of January 24, 1865.

The petitioner, a citizen of the state of Arkansas, was regularly licensed and actually practicing as an attorney of this court when the rebellion broke out; he joined its destinies, participated in its career, and has drunk the cup of its doom. He has submitted to the government, *and for reasons which were satisfactory to the President*, has been fully pardoned. He now claims the right to resume his practice, and to argue causes now pending in this court, in which he had been retained and entered his appearance previous to the rebellion. He is confronted with the test oath prescribed by the above-named act of Congress, which he cannot take. The court must therefore set aside the act, or the petitioner must retire from this bar to suffer through life a bitter punishment for a *pardoned* offence.

The act of Congress is as follows:

Chapter CXXXVIII.—An Act to prescribe an Oath of Office, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That hereafter every person elected or appointed to any office of honor or profit under the Government of the United

States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, and before being entitled to the salary or other emoluments thereof, take and subscribe the following oath or affirmation: "I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; *that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto*; that I have never sought nor accepted, nor attempted to exercise the functions of *any office whatever, under any authority or pretended authority in hostility to the United States;* That I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear, (or affirm,) that to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God;" which said oath, so taken and signed, shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain. *And any person who shall falsely take the said oath shall be guilty of perjury; and, on conviction,* in addition to the penalties now prescribed for that offence, *shall be deprived of his office, and rendered incapable forever after of holding any office or place under the United States.*

APPROVED *July* 2, 1862.

This act, by another law of Congress, dated January 24, 1865, (38*th Cong.*, 2*d Session*, *ch.* 20, *p.* 424,) was extended to attorneys in the United States courts; and it was provided that after the 24th January, 1865, no person should be admitted to practice in the Supreme Court, and after the 4th of March, 1865, in any district or circuit court, of the United States, or Court of Claims, *even if he were previously an attorney of such court, unless he should take the oath set forth in the act of July* 2, 1862.

It is conceded that this act is a bar to the right asserted

by the petitioner, if it be not in conflict with the Constitution; this is therefore the only subject to be discussed.

I.

In discussing the constitutionality of any law of Congress, the real question is, *would the act accomplish a result which the Constitution forbids?* If so, no matter what may be the form of the act, it is unconstitutional.

This court, in *Green vs. Biddle*, 8 Wheat., 1; *Bronson vs. Kinzie*, 1 How., 311; and in *McCracken vs. Haywood*, 2 How., 602, has held that although the states may legislate at pleasure upon remedies merely, yet if the practical effect of such legislation in a given case, be to burthen the right of a creditor unreasonably, or withdraw the debtor's property from the reach of the creditor, then such law is unconstitutional, as impairing the obligations of the contract. In Bronson vs. Kinzie, C. J. Taney says: "Whatever belongs merely to the remedy may be altered 'according to the will of the state, provided the altera-'tion does not impair the obligation of the contract. *But 'if that effect is produced*, it is immaterial whether it is 'done by acting on the remedy, or directly on the con-'tract itself. *In either case it is prohibited by the Constitu-'tion.*"

Again he says: "And no one, we presume, would say 'that there is any substantial difference between a retro-'spective law declaring a particular contract or class of 'contracts to be abrogated and void, and one which took 'away all remedy to enforce them, or incumbered it with 'conditions *that render it useless or impracticable to pursue 'it.*"

In the passenger cases, 7 Howard, this court held that state laws, nominally mere health or police laws, were unconstitutional, *because, in their effect*, they amounted to a regulation of commerce; and therefore were an exercise of power vested exclusively in the Federal Government.

Your Honors hold office for life, or, what amounts to the same thing, during good behavior. An act of Congress

passed to-day requiring the justices of this court to take an oath that they were not above forty years of age, and providing, as the act in question does in relation to attorneys, that, "*after the 4th March next, no justice of this court 'should be admitted to his seat, unless he should take such oath, 'even if he were previously a justice of said court,*" would be a palpable violation of the Constitution, *because it would amount to a disqualification to any man above forty years of age*, and be equivalent to providing that no justice of this court should remain in office beyond that age; while the Constitution provides that Your Honors shall hold during good behavior.

The Constitution provides, Article III., section 3, "no 'attainder of treason shall work corruption of blood, or 'forfeiture, except during the life of the person attainted." Now an act of Congress or of a state, declaring that before any heir should enter into his ancestral estates he should take an oath that his ancestor had not been *attainted of treason*, would violate this provision; *and could be intended for no other purpose.*

Assault and battery is a crime punishable by fine of $50, but not with disqualification to hold office. Suppose A to-day commits that offence, is tried and fined. To-morrow Congress passes a law that no person shall be admitted to hold any office of honor, profit or trust, until he shall subscribe an oath *that he has never committed* the crime of assault and battery. Is it not perfectly apparent that such act, *in its practical operation*, would be *ex post facto*, as adding to the punishment of assault and battery an important penalty not attaching when the crime was committed?

These are instances, and many might be cited, illustrating the proposition that an act is unconstitutional, *which accomplishes a result forbidden by, or in conflict with, the Constitution.*

II.

WHAT THEN IS THE RESULT ACCOMPLISHED BY THE ACT COMPLAINED OF, and how does that result accord with the spirit and provisions of the Constitution?

This may be considered, (1) with reference to the petition; and (2) upon principle generally.

1. Conceding for the purpose of this argument that the petitioner has been guilty of treason, for which, on conviction in the manner provided in the Constitution, (on the testimony of two witnesses to the same overt act, or on confession in open court,) he might have been punished with death.

The President has fully pardoned the petitioner for this offence; and the constitutional effect of that pardon is to restore him to all his rights, civil and political, including the capacity or qualification to hold office, as fully in every respect as though he had never committed the offence. Previous to the rebellion, the petitioner was not only qualified to be, but actually was a member of this bar; in consequence of his supposed treason, *and only* in consequence of that, he subjected himself to the liability of forfeiture of that office; but the pardon wipes out both the crime and the liability to punishment, and restores the petitioner to the rights he before possessed, including the right to practice at this bar; yet this act fixes upon this petitioner, as a consequence of the offence, *a perpetual disqualification to hold this or any other office of honor, profit, or trust.* In other words this act accomplishes a result in direct opposition to the constitutional effect of the pardon. Dropping names and forms and considering the substance of things the President says, by his pardon, "*You shall not be precluded from practicing in the Supreme Court in consequence of your crime; I pardon you.*" The act says, "You shall never practice in the Supreme Court without taking an oath which will be perjury, and then on conviction of that, that shall disqualify you." The President is trying to *pardon*, and Congress to *punish* the petitioner for the same offence; and the only question is, *which power prevails over the other.*

To examine this subject in detail we must consider first the nature and effect of the pardon granted to the petitioner; and secondly, the character and effect of the oath

prescribed by the act. If it can be shown that the pardon, in its constitutional effect, extinguishes the crime and precludes the possibility of any punishment whatever; and that the oath in effect fixes a disqualification, wich is in the nature of a penalty or punishment for the same offence, then of course the conflict between the two is established, and I presume it will be conceded, in that case, that the pardon must prevail.

FIRST: THE PARDON.

The Constitution provides, Art. II., Sec. 2, that the President "shall have power to grant reprieves and par-'dons for offences against the United States, *except in cases* '*of impeachment.*" This language is too plain to admit of a doubt. "Offences," means "all offences;" and then the express exception of cases of impeachment is a repetition of the same idea. The Federalist having been published to the people by three great Statesmen pending the question of the adoption of the Coustitution, and being a cotemporaneous exposition of its provisions, has always been quoted as an authority second only in weight to the solemn decisions of this court.

Mr. Hamilton, in No. LXXIV., speaking of the President's pardoning power, says: "Humanity and good 'policy conspire to dictate that the benign prerogative of 'pardoning should be as little as possible fettered or em-'barrassed. The criminal code of every country partakes 'so much of necessary severity, that without an easy ac-'cess to exceptions in favor of unfortunate guilt, justice 'would wear a countenance too sanguinary and cruel. 'As the sense of responsibility is always strongest, in pro-'portion as it is undivided, it may be inferred, that a 'single man would be most ready to attend to the force 'of those motives, which might plead for a mitigation of 'the rigor of the law, and least apt to yield to consider-'ation which were calculated to shelter a fit object of its 'vengeance."

He then proceeds to show that while there are objec-

tions to giving to the President the power to pardon the crime of treason, so also there are reasons in favor of it, which outweigh the objections. He says: "In seasons of 'insurrection or rebellion, there are often critical moments, 'when a well timed offer of pardon to the insurgents or 'rebels may restore the tranquility of the commonwealth, 'and which if suffered to pass unimproved, it may never 'be possible afterwards to recall. The dilatory process 'of convening the legislature, or one of its branches, for 'the purpose of obtaining its sanction, would frequently 'be the occasion of letting slip the golden opportunity. 'The loss of a week, a day, an hour may sometimes be 'fatal."

The people therefore understandingly, and of purpose, clothed the President with the power to pardon treason. Now where are we to look for the nature, extent, and effect of an exercise of this power?

Marshall, C. J., in U. S. vs. Wilson, 7 Pet., 150, speak- 'ing of the pardoning power, says: "As this power had 'been exercised from time immemorial by the Executive 'of that nation, whose language is our language, and to 'whose judicial institutions ours bear a close resem- 'blance, we adopt their principles respecting *the operation* '*and effect of a pardon*, and look into their books for the 'rules prescribing the manner in which it is to be used 'by the person who would avail himself of it."

This court, delivering its opinion by Mr. Justice Wayne in *ex parte* Wells, 18 How., 315, say, quoting this language from C. J. Marshall, that "it was with the fullest knowledge 'of the law upon the subject of pardons, and the philoso- 'phy of government in its bearings upon the Constitution, 'when this court instructed Chief Justice Marshall" to hold this language; and add, "We still think so, and that 'the language used in the Constitution, conferring the 'power to grant reprieves and pardons, must be construed '*with reference to its meaning at the time of its adoption.*" The court proceed to say that the power granted to the President was the same that had before been exercised by the

Crown of England. Now let us turn to the English and American authorities. In Lilly's Abridgment, 270, quoted and followed in *ex parte* Hunt 5, English 287, it is said: "A pardon doth discharge not only the punishment which 'was to have been inflicted upon the person that did com- 'mit the offence pardoned, but also the guilt of the offence 'itself. It pardons *culpa* so clearly that in the eye of the 'law the offender *is as innocent as if he never had committed* '*the offence*. So far doth mercy extend therein."

To same effect see Chitty on Prerogative of the Crown, page 102; title, "Effect of a Pardon."

In 2d Sharswood's Blackstone, 402, it is said: "The 'effect of a pardon is to make the offender a new man; 'to acquit him of all corporal penalties and forfeitures 'annexed to that offence for which he obtains a pardon; 'it gives him a new credit and capacity; and the pardon 'of treason or felony, even after conviction or attainder, 'will enable a man to have an action of slander for calling 'him a traitor or felon."

Bacon's Abridgment says: "The stroke being pardoned, the effects of it are *consequently* pardoned;" and refers to Cole's Case, Plowden, 401. Same authority (415–16, Notes A and B) says: "The pardon removes all punishment and legal disability." (See, too, Gilb. Ev., 128; 2 Bulst., 154; 1 Sid., 52; 2 Russell on Crimes, 596, 2d edition, note E.) Pardon prior to conviction shall prevent all forfeiture of lands and goods. (2 Russell, 418.)

1. Bishop's Criminal Law, sec. 713, says: "The effect 'of a full pardon is to absolve the party from *all the conse-* '*quences* of his crime, and of his conviction therefor, direct 'and *collateral;* it frees him from the punishment, whether 'of imprisonment, pecuniary penalty, or *whatever else the* '*law has provided.*"

The present Attorney General of the United States, in an opinion of May 1, 1865, page 7, says: "As an act of 'grace freely given, it (the pardon) should be liberally 'construed in favor of the repentant offender." "After 'the pardon has been accepted, it becomes a *valid* act, and '

'the person receiving it is entitled to all its benefits." (*Ib.* 12.) "The grace and favor of the government should 'ever be large and generous, and the *operation* and *effect* 'of its proffered mercy should not be left uncertain." "Persons who have been constantly engaged in rebellion 'should know distinctly what they are to do, when and 'how to do it, to free themselves from punishment, in 'whole or in part, *or to reinstate themselves as before the rebel-* 'lion." (*Ib.* 11.)

Opinion of the Judges, 4 R. I., 583, holds that a pardon relieves the party of *all civil disabilities of crime*, except that the right to vote, by *their* constitution, must be restored by the legislature.

In Cope vs. Cone, 28 Penn St., 303, the court say: "We 'are satisfied, however, that although the remission of the 'fine imposed would not discharge the offender from *all* 'the consequences of his guilt, a full pardon of the offence 'would."

In Jones vs. Harris, 1 Strob., 162, and in Peo. vs. Pease, 3 Johnson's Cases, 383, a pardon was held to render the convict a competent witness, upon the ground that the pardon removed not only the punishment *but the stigma of guilt.*

In Perkins vs. Stevens, 23 Pic., 280, it is said: "It is 'only *a full pardon of the offence which can wipe away the* 'infamy of the conviction, and restore the convict to his civil 'rights;" and quoting from the attorney general of that state, the court approve the following language: [Pardon] "When fully exercised is an effectual mode of re- 'storing the competency of a witness. It must be fully 'exercised to produce this effect; for if the *punishment* 'only be pardoned or remitted it will not restore the com- 'petency, and does not *remove the blemish of character.* 'There must be a full and free pardon of the offence before 'these can be released and removed."

These authorities show that the people intended to, and in fact did, clothe the President with the power to pardon all offences, and thereby to wash away the legal stain and

extinguish all the legal consequences of treason—all penalties, all punishments, *and everything in the nature of punishment.*

The President, for reasons satisfactory to him, and of the sufficiency of which he is the *sole* and *exclusive* judge, has exercised this power in favor of the petitioner. The effect of the pardon therefore is to make it impossible for any power on earth to inflict, constitutionally, any punishment whatever upon the petitioner for the crime of treason specified in the pardon. It only remains to consider whether this act, *in its practical effect upon the petitioner*, inflicts a forfeiture or punishment.

III.

THE ACT APPLIED TO THE PETITION, IN SUBSTANCE AND EFFECT, VISITS UPON HIM A PUNISHMENT FOR HIS PARDONED CRIME.

It will be conceded that the effect of this act is to exclude the petitioner from this and from all civil office.

That a permanent disqualification for office is a grievous punishment, need not be argued in America. Our whole people, with one voice, would exclaim to punishment—

"Take any shape but that," &c.

The eligibility of every native-born American citizen to the highest office is the dream of childhood, the spur to ambition in manhood, the highest boast of our nation, and the grandest privilege of the individual citizen. Every American believes that if he can first get an office, "*all things will be added unto him.*" Disqualification to civil office is therefore the sum of all sorrows, the absence of what every American citizen prizes most; a condition to be compared to nothing but Romeo's banishment;—"*howlings and outer darkness attend it.*"

In the matter of Dorsey, 7 Porter (Ala.), 293, a motion was made for the admission of Dorsey as an attorney, and to dispense with administering to him the oath in relation to dueling, required by the act of 1826. This act provided that "all members of the general assembly, all offi-

'cers and public functionaries, elected or appointed under 'the Constitution or laws of the state, and all coun- 'sellors and attorneys at law," before entering upon their office, should take an oath that they had never been engaged in any duel, and that they never would be.

This case occupies some two hundred pages, and is a very able and elaborate discussion of this subject, and is a full authority, on all fours, for the position we take in this case. We commend it to the careful consideration of the court. It was there held:

1. That in that case the law prescribed a qualification for holding office, which an individual never could comply with, and that such act, as to him, was a disqualification.

2. That such disqualification was punishment.

3. That the retrospective part of the oath was unconstitutional.

4. That as a part of the oath was unconstitutional, and the court could not separate it, the whole oath was unconstitutional, and the petitioner was entitled to be admitted without taking it.

Goldthwaite, J., says, p. 366: "I have omitted any argu- 'ment to show that disqualification from office, or from 'the pursuits of a lawful avocation, *is a punishment; that 'it is so, is too evident to require any illustration; indeed it may 'be questioned whether any ingenuity could devise any penalty 'which would operate more forcibly on society.*"

Again, page 368: "There is another view in which 'this act may be considered. The governor is invested 'with authority, by the eleventh section of the fourth 'article, to grant reprieves and pardons in all criminal 'and penal cases, except in those of treason or impeach- 'ment. We cannot presume that the general assembly 'intended by this act to interfere with the constitutional 'prerogative of mercy vested in the executive, *yet this act, 'if constitutional, imposes a penalty which cannot be remitted, 'and inflicts a punishment beyond the reach of executive clem- 'ency.*"

Barker vs. the People, 3 Cow., 686, will be found wor-

thy of examination in this connection, and there will be found a full discussion of the character of such disqualification. The court say: (the Chancellor,) "Whether the 'legislature can exclude from public trusts any person 'not excluded by the express rules of the Constitution, is 'the question which I have already examined, and accord-'ing to my views of that question, there may be an exclu-'sion by law, *in punishment for crimes, but in no other man-'ner, and for no other cause.*"

In same case in supreme court, where the opinion was delivered by Spencer, C. J., it is said: "The disfranchise-'ment of a citizen is not an *unusual* punishment; it was 'the consequence of treason, and of infamous crimes, and 'it was altogether discretionary in the legislature to extend 'that *punishment to other offences.*"

The very act we are considering provides this punishment for those who shall be convicted of perjury for taking the test oath falsely, but the highest authority that exclusion is *punishment*, is the Constitution of the United States itself: Article I., section 3— "Judgment in cases of 'impeachment shall *not extend further than to removal from 'office, and disqualification to hold and enjoy any office of honor, 'trust, or profit under the United States.*"

For the highest crimes, and on trial in the most solemn form known to the Constitution, *the only punishment is disqualification.*

These authorities, we claim, fully establish—

1. That the pardon absolves the petitioner from all punishment for his offence; and

2. That the act in question does, in its operation upon the petitioner, disfranchise him from holding office; and

3. That such disfranchisement is in effect a punishment for the same offence for which he has been pardoned; and, therefore,

4. That the act and the pardon are in conflict, and the pardon must prevail.

IV.

We deem the foregoing objections to this act conclu-

sive as regards this pardoned petitioner; but it would perhaps be omitting a duty that every lawyer owes his country not to call attention to other general objections to this act.

1. What right has Congress to prescribe other qualifications than are found in the Constitution; and what is the limit of the power? Of course the power is conceded to make perpetual or limited disqualification *one of the penalties of crime, applying the act prospectively.* Such was the act sustained in Barker's case, 20 Johnson and 3 Cowen, before cited; but where does Congress get the power to disfranchise and disqualify any citizen, *except as punishment for crimes, whereof the party shall have been duly convicted?*

Congress can exercise none but actually delegated powers, or such as are incidental and necessary to carry out those expressly granted. If this act is constitutional, then there is no limit to the oaths that may be hereafter prescribed. The whole matter rests in the *discretion* of Congress. A law requiring every public officer to swear that he voted for a particular candidate at the last election, or leave his office, would be more wanton, but not less constitutional, than the one we are considering; for if it is in the constitutional *power* of Congress to require these disfranchising oaths to be taken, *then Congress alone can determine their nature.* There is no appeal from its determination of any matter within its constitutional province. No power on earth can relieve against an abuse by Congress of its discretion. It is quite apparent that to concede such a power would enable a corrupt Congress to keep its own party forever in power. Any party might brand its opponents with disqualifications, until we should realize the state of things Mr. Jefferson so eloquently deprecates in his first inaugural address. He says:

"Let us then, fellow-citizens, unite with one heart and 'one mind; let us restore to social intercourse that har-'mony and affection, without which liberty and even life 'itself are but dreary things. And let us reflect that hav-

'ing banished from our land that religious intolerance 'under which mankind so long bled and suffered, we have 'yet gained little if we countenance a political intolerance 'as despotic, as wicked, and capable of as bitter and 'bloody persecutions."

2. The Constitution provides, (Art. V., Amendments:)

"No person shall be held to answer for a capital or 'otherwise infamous crime, unless on a *presentment or 'indictment* of a grand jury; except" &c. * * "Nor 'shall he be compelled in any criminal case *to be a witness 'against himself*, nor be deprived of life, liberty, or *prop-'erty, without due process of law*," &c.

Now, suppose murder or treason to have been in fact committed by a public officer, but that there is no witness to establish the fact. Can Congress pass a law requiring him, as a condition to his further continuance in office, or ever after holding any office, *to take an oath that he has not committed murder or treason?* If so, all the consequences which can follow from conviction on impeachment, viz: incapacity to hold office, may be visited upon the guilty party without indictment, trial, or witnesses produced against him, and without any process of law whatever; and Congress may by *ex post facto* laws brand the most trifling offence, or even a difference of political opinion, with total disqualification to hold office. Such rapid administration of justice might often reach a correct result and disfranchise a guilty man whose absence from office might not endanger the republic; but the question is, *is it a constitutional method of establishing and punishing guilt?*

3. The petitioner's right to practice in this court is property. In Wammack vs. Halloway, 2 Ala., 31, it was held by the court unanimously, that "the right to 'exercise an office is as much a species of property as any 'other thing capable of possession; and to wrongfully 'deprive one of it, or unjustly withhold it, is an injury 'which the law can redress in as ample a manner as any 'other wrong; and conflicting claims to exercise it must

'be decided in the same manner as other claims involv-'ing any other right, if either of the claimants insist on a 'jury."

In *ex parte* Heyfron, 7 How., (Miss.,) 127, it was held: "Error to strike an attorney from the roll on motion with-'out giving him notice of the proceeding," the court saying "It is a cardinal principle in the administration of 'justice that no man can be condemned, *or divested of his* '*rights*, until he has had an opportunity of being heard."

In the matter of Cooper, 22 N. Y. Rep., 67, it was held that the court in passing upon the admission of an applicant to practice as an attorney, acted judicially and their decision was reviewable in the appellate court.

See, also, Strother vs. State, 1 Missouri, 405.

In ex parte Secomb, 19 How., 9, this court say (by C. J. Taney): "It rests exclusively with the court to deter-'mine who is qualified to become one of its officers, as an 'attorney and counsellor, and for what cause he ought to 'be removed. *The power, however, is not an arbitrary and* '*despotic one, to be exercised at the pleasure of the court, or* '*from passion, prejudice, or personal hostility;* but it is the 'duty of the court to exercise and regulate it by sound 'and just judicial discretion, whereby the rights and inde-'pendence of the bar may be as scrupulously guarded and 'maintained by the court as the rights and dignity of the 'court itself." And, on p. 15, the court intimate that the judgment of the court below removing the petitioner from the bar might be reviewed in this court on appeal.

These cases show that the petitioner has a vested right in his office as an attorney of this court, of which he can only be deprived by some regular judicial proceeding. He may be removed for cause, but the adjudication of the court in the premises is a judicial judgment, which may be reviewed on appeal.

Depriving the petitioner therefore of his office by an enforcement of this act of Congress is depriving him of his *property* without due process of law.

This act was a part of the war policy of Congress, and finds its only apology in the trying circumstances under which it was enacted. The government was tempest tost upon the billows of rebellion, the people beside themselves with excitement and sorrow; our sons were falling on southern fields, our daughters weeping in northern homes. Standing by fresh-laid graves we were moved to madness by the cry of the widow and the shriek of the orphan; and this act condenses and embodies in the form of a law the blind retribution inspired by *the agony of a nation*. But, thank God! that hour of danger and distress has passed; treason is laid and buried in the bottomless depths of darkness; and there is no danger that the ghost of secession will rise from its grave *to startle statesmen from their stools*.

Now, with humble thanks for our deliverance, wiping the blood sweat from our brow and "hanging up our bruised arms for monuments," a magnanimous people and a victorious government must come to inaugurate and administer a philosophy of peace—wise, grand, catholic, statesmanlike philosophy of permanent peace. In one department of the government, at least, these exciting questions will be discussed by lawyers and decided by judges. From this *sanctum sanctorum* of justice there will go forth "*a still small voice*" that will penetrate to the uttermost limit of a continent; that will still the troubled waves of popular excitement and illumine the murky atmosphere that envelopes all discussion of this subject. Give us one silver note of constitutional truth to still the clamor of the hour, and though the earth may seem to rock and the stars *seem* to fall, we shall outride our perils and make our way triumphantly towards the open sea of future prosperity and peace.

REVERDY JOHNSON,
MATT. H. CARPENTER,
For Petitioner.

Stanbury Three questions
1. Effect of hard work
2. Are Constitutional

Shall not discuss license
Will consider the effect of hard work
Have Cons[t] of long standing
Works heavily used
Only one case upon the point
Don't help much the offence old principle
Poison must be accepted
must be pleaded
Many a man of straw not known
The Queen [illegible] the Spl. act died
W. States v Wilson 7 Wheat 1822
Does not protect against all consequences
not convict upon others
not take away from a person
if tempted drunk, insane of crime, new trial
Suppose one has lost check upon
acts of impulse prohibitory power, notion, &c
Acts preparatory, means, with effect
Cost act against Lawyers
Suppose exclusion of perjury - would harden
after conviction as to it here
Only temperate torment, fines, & penalties

Constitut[l]

to post facto -
Bills of attainder without trial & Bolles
Depriving trial without jury
Compelling witness against one self
Without [illegible] consideration to ex post facto
Statute of frauds
How is to be post facto:
Effect of [illegible] on matter
Laws intentionally fix at time of passage

Hopes Lawyers to refuse - Rebellion offshoot
offshoots - now suppressed but which come back

In the Supreme Court of the United States.

No. 6.—Original.

EX PARTE: IN THE MATTER OF A. H. GARLAND, OF ARKANSAS, PETITIONER.

To show that the oath prescribed by the act of Congress is not inconsistent with the Constitution of the United States, the court is referred to the case of Cohen *v.* Wright, 22 California Reps., 293, and the authorities cited and commented upon in that case, and to the Opinion of Chief Justice Marshall in the case of McCullough *v.* The State of Maryland, 4 Wheaton, 416.

As to the effect of the pardon which the petitioner relies upon, the court is referred to the case of Silas Cook *v.* The Board of Chosen Freeholders of Middlesex, 2 Dutcher's Reps., 326, and the authorities cited and commented upon in that case.

JAMES SPEED,
Attorney General.

ARGUMENT

IN THE

UNITED STATES SUPREME COURT,

DECEMBER TERM, A. D., 1865,

BY

A. H. GARLAND, OF ARKANSAS,

ON HIS APPLICATION TO BE PERMITTED TO PRACTICE IN SUCH COURT WITHOUT TAKING THE OATH, AS PRESCRIBED BY ACT OF CONGRESS OF JULY 2, 1862, AND JANUARY 24, 1865.

McGILL & WITHEROW, Printers and Stereotypers, Washington, D. C.

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ARGUMENT.

Under the 2d rule of this court, the petitioner (A. H. Garland) was, on the 26th day of December, A. D. 1860, admitted as attorney of this court; and the oath, as prescibed, was on that day administered to him, and reads as follows: "*I, A. H. Garland, do solemnly swear, that I will demean myself, as an attorney and counsellor of this court, uprightly and according to law; and that I will support the Constitution of the United States.*"

The 2d rule, already referred to, is in these words: "*It shall be requisite to the admission of attorneys and counsellors to practice in this court, that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.*" There is no other qualification for attorneys in this court than such as are named in this rule. This is now the rule of this court on this subject. And until the acts of Congress of July 2, 1862, and January 24, 1865, the oath was just as it appears in this rule.

At the same term at which he was admitted, petitioner appeared and presented printed arguments in several cases in which he was counsel. His name continued on the roll of attorneys from then to the present time; but the late rebellion interrupted his attendance upon the court, and all business in which he was concerned at the time of his admission remains undisposed of. In some of the cases alluded to fees were paid, and in others they were partially paid. Having taken part in the late *rebellion* against the United States, by being in the Congress of the *so-called* Confederate States, from May, 1861, until the final surrender of the forces of such Confederate States, petitioner cannot take the oath prescribed by the acts of Congress before-mentioned. The oath is to be found in the following act of Congress:

CHAPTER CXXXVIII.—An Act to prescribe an Oath of Office, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That hereafter every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, and before being entitled to the salary or other emoluments thereof, take and subscribe the following oath or affirmation: "I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have never sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear, (or affirm,) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God;" which said oath, so taken and signed, shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain. And any person who shall falsely take the said oath shall be guilty of perjury; and, on conviction, in addition to the penalties now prescribed for that offense, shall be deprived of his office, and rendered incapable forever after of holding any office or place under the United States.

APPROVED July 2, 1862.

This act, by another law of Congress, dated January 24, 1865, (*38th Cong., 2d Session, ch.* 20, *p.* 424,) was extended to attorneys in the United States courts; and it was provided, that after the 24th January, 1865, no person should be admitted to practice in the Supreme Court, and after the 4th of March, 1865, in any district or circuit court, of the United

States, or Court of Claims, even if he were previously an attorney of such court, unless he should take the oath set forth in the act of July 2, 1862.

Under another law of Congress, petitioner has paid his tax of ten dollars to the proper officer of the United States, and received his license to practice law; but this does not permit him to practice in the United States courts without taking the oath.

Petitioner comes at this time, and asks to be permitted to practice in this court without taking the oath, and sets forth a pardon, in due form, granted by the President to him on the 15th day of July, A. D. 1865, and in his application he contends, as he does in this argument: 1st. That the act of Congress prescribing this oath is unconstitutional upon its face; 2d. That as far as it affects his status in this court, it is palpably in violation of the Constitution; 3d. That if it be not unconstitutional, the pardon of the President restores him to his rights as an attorney of this court, notwithstanding the oath; and 4th. That as the United States, through Congress, has collected revenue of him, for the privilege of being a lawyer, his right to practice in the courts of the United States follows, at least, so far as any obstacle thrown in the way by the oath are concerned.

The law prescribing this oath, it is assumed, was enacted to aid in suppressing the *rebellion* lately existing against the United States, by putting it beyond the reach of any one in the least tainted with treason, or other crimes against the United States in aid of the *rebellion*, to practice in the Federal courts. In other words, it stands thus: that because one has aided the rebellion, he cannot enjoy the rights and privileges of an attorney in the courts of the United States. Of course he cannot, without committing the crime of perjury, which has been termed by high authority *a God-defying sin;* and when one must violate a law to enjoy a right to which he would otherwise be entitled, it is precisely the same in legal contemplation as if he were directly and unmistakeably deprived of that right by law. There can be certainly no doubt of the interpretation of this law. But for acts hostile to the United States, no oath would have been deemed necessary. And after the Government had worked so long and so well, without such a test, it must be admitted that the *rebellion* gave birth to this act. Congress undertakes, then, to say, that all persons, before they can practice in these courts, notwithstanding their rights may be restored to them by an act of grace on the part of the Executive, must take

an oath that did not exist before the acts which make the oath necessary were committed. It is equivalent to saying, unless you do blacken your souls with perjury, Congress will so far interfere with and trammel the pardoning power of the President, as to deprive you of certain rights. Argue it as you will, it is a clear and direct interference with the power of the President to grant pardons; it is making conditions of pardon, which are within the authority of the Executive, and him alone. The *Constitution* (2d Art., Sec. 2., cl. 1.) vests the President with authority, or rather the "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." This language is clear and explicit, and cannot admit of doubt as to its meaning. This is a power belonging to the Executive, not to be controlled or limited by Congress. There being no qualification—save as to impeachments—Congress cannot make any. The wise and pure fathers of our Constitution watched nothing in its whole frame-work with more jealousy and anxiety, than the independence of each of the three branches of the Government. If the President can pardon, subject to the exceptions and qualifications that Congress may impose, this prerogative is gone from him, and he depends to this extent upon the will, wish, or caprice of Congress.

Story, in his Commentaries on the Constitution, (sec 1498,) says, that humanity and sound policy dictate that this prerogative should be fettered as little as possible; and except in cases of impeachment, contempt, etc., the power to pardon is unqualified, and reaches from the highest to the lowest offences. And again he declares, that no law can abridge the constitutional power of the President to pardon. (Secs. 1503, 1504, *Ib.*)

Without any authority to sustain this view of it, such must be inferred from the very nature of our Constitution. But *Mr. Crittenden*, while Attorney General, held this to be the true principle. (5 vol. Andrews' Ops. Attorneys General, p. 532.) So did *Mr. Cushing*, in several long and elaborate opinions. (6 *Ib.*, pp. 20, 123, 393, 488.) And even later than all, considering this very question with others, *Mr. Speed*, the present Attorney General, concedes this power, without restriction, reservation, or qualification, only as to impeachments, as named in the Constitution: (Opinion of May 1, 1865, pamphlet.) This power, he grants, extends as well to a general proclamation of amnesty as to pardons in particular cases. And by argument, supported by authority, he shows

that a general proclamation of amnesty is a proper exercise of that power granted to the President by the second article of the Constitution. Why did the Constitution except from his pardoning power cases of impeachments? Most clearly, because impeachments belonged to another and co-ordinate branch of the Government; and to give him the power to pardon in such cases, would have, to this extent, stripped Congress of its jurisdiction in these cases. Judge Story (sec. 1503, sup.) gives this expressly as a reason why the Constitution withheld all such cases from him. And in England the same doctrine is held because of the independence of the different branches of the government. (2 Sharswood's Blackstone, 397.) The impeachment and trial of the Earl of Danby, in the reign of Charles II., is a familiar case upon this point, and the rule there laid down has been adhered to in that country, and, in effect, has been inserted in our Constitution; (11 Howell St. Trials, 599.) Will not this rule work equally as well in the other direction? If the President cannot pardon in cases of impeachment, because thereby he would interfere with the authority or jurisdiction of Congress, why, or how, can Congress interfere with his powers, granted him under the Constitution without limitation? If this benign power can be thus restricted by Congress, the President, in one of the most important prerogatives of his office, is not independent, but the mere instrument of Congress. And it does seem that the President might as well say to Congress, that there shall be no Sergeant-at-Arms, or Chaplain, in either House, unless they come before him daily and make and renew their pledges of fidelity to his administration.

This law is obnoxious to the objection, that it is retrospective in its operation and effect. It stamps certain acts and deeds with a character totally different from that which they wore when committed; and by new principles, introduced by its own terms, seeks to settle rights existing at the time of its passage. Chancellor *Kent* (1 Com., 455) says, "a retrospective statute, affecting and changing vested rights, is very generally conceded in this country, as founded on unconstitutional principles, and consequently inoperative and void;" and this is the received and recognized doctrine everywhere in our country. (Smith's Comm's Const. and Stat. Law, 150–174; Society *vs.* Wheeler, 2 Gallison, 139.) This last case is strong and to the point. *George Sharswood*, in his Introduction to his Professional Ethics, p. 40, uses the following very happy language as to retrospective laws, and it

is in such perfect keeping with the whole current of authority on this subject, it is inserted here as quite sufficient on this head: "There is no particular or partial inconvenience which could outweigh the general benefits of a principle that no law, public or private, should operate retrospectively upon past acts; that the judgment of the tribunals upon every case should be according to the law as it was at the time of the transaction, which the parties were bound to know, and in accordance with which they are presumed to have acted." The case of *Calder vs. Bull*, (3 Dallas, 390–1) contains much, if not the whole doctrine, upon this subject, as well as a full exposition of the prohibition in the Constitution as to *ex post facto* laws; and that case has never yet been departed from. In that case Judge *Chase* laid down, in express terms, what laws came within the meaning of the constitutional prohibition, and the law (or laws) we are now considering falls within nearly every one of the classes named by him. (See, too, Fletcher *vs.* Peck, 6 Cranch, 138.) The definition here adopted was used by Chancellor *Kent* as sufficient, and he says, "this definition (Fletcher *vs.* Peck) is distinguished for its comprehensive brevity and precision, and it extends to laws passed after the act, and affecting a person by way of punishment of that, either in his person or estate. (1 Kent's Coms., 408.) *Story* (Comm's on Const., 2 vol., sec. 1345) uses the very same definition that is laid down by Judge *Chase*. Congress cannot pass such laws, any more than can the State Legislatures, and there can be no doubt that the technical meaning which has been affixed by this court to laws of that character passed by the State Legislatures, will be applicable to any *ex post facto* law which might be passed by Congress; for *Story*, (Comm's on Const., 2 vol., sec. 1373,) speaking of the prohibition upon the States to pass *ex post facto* laws, says, "the same policy and principles apply to each, (State and United States Governments,) and cites the Federalist, Nos. 44, 84; and these numbers discuss the third clause, section nine, article one, of the Constitution, which says, "no bill of attainder or *ex post facto* law shall be passed. And Judge *Chase*, in the case from 3 Dallas, *sup.*, characterizes all such laws as *unjust and oppressive*. Whatever may be the meaning of this act, it is in its nature and effect a penalty for aiding the *rebellion*. Disguise it as we may, such it must be held from its own reading. By way of punishing those who have engaged in the *rebellion*, they are forced to take an oath which is false when taken, or forfeit their right to practice in the Federal courts. Penalty

means "a punishment imposed by statute as a consequence of the commission of a certain specified offense." (2 Burrill's Law Dictionary, 789.) The same authority (1 vol, 507) defines forfeiture to be "the loss of what belongs to one, by some fault, misconduct, or transgression of law; a thing or sum of money forfeited; associated with penalty." Let us apply this to the case. Because the petitioner aided the *rebellion* he is punished, by having his right to practice in the Federal courts forfeited. This is the plain translation of it. The right to practice in this court, as is shown by the petition, is not a mere form, nor is it a mere empty privilege; but, as will be shown in an after part of this argument, it is a substantial and valuable *estate* to petitioner, and one which was guaranteed to him in all its consequences by his contract when he entered into it. This law, then, aggravates the crime, and makes it greater than when it was committed, and comes within the second class, as laid down by Judge *Chase*, in Calder *vs.* Bull, *sup.* It also changes the punishment, and inflicts a greater punishment than when the act or crime was committed, and is therefore within the third class, as given by Judge *Chase*. Congress knew certainly that those who had aided in the *rebellion* could not take the oath; and because they could not, they must be punished by forfeiture. If the law, as expounded in 3 Dallas, *sup.*—and adopted by all subsequent authority—had been decided in this case, and upon this act of Congress, it could not have been more applicable. It is scarcely worth while to call the attention of the court to the fact, that none of the acts mentioned in the oath, if punishable at all by the criminal laws of the United States, are punished by forfeiture of the estate of the party accused, except by the liberation of his slaves, if he have any. And certainly this novel way of punishing persons is to be well considered, before it is received into our code of laws; and it is to be hoped it may never be sanctioned in any country where constitutional liberty and constitutional rights are as much boasted of as they are in ours.

Again, supposing it is agreed that the act in question is in the nature of a penalty, as there can be no doubt it is; has not Congress undertaken to deprive the petitioner of his property without "*due process of law?*" If so, the law is objectionable for violating the fifth article of the Amendments to the Constitution, which says that no one shall be deprived of life, liberty, or *property*, without due process of law. This feature of our Constitution is borrowed from

Magna Charta, substituting "*due process of law*" for "*law of the land.*" By this is not meant simply an act of the General Assembly, or of Congress, but law in its regular course of administration through courts of justice. (Coke 2d Inst., 50; 1 Kent's Com., 620; Green vs. Briggs et al., 1 Curtis, 325-6.) The party is not cited to appear; he is not presented or indicted; he is not tried or convicted; but, by legislative condemnation, he is deprived of a right upon which his living may depend. These restrictions in the fifth amendment are justly considered among the most valuable rights secured to the citizen under our Constitution; and that good and great man, Judge *Taney*, in speaking of them in the *Merryman case*, termed them "great and fundamental laws, which Congress itself could not suspend." Buckle, in his History of Civilization in England, praises our Declaration of Independence, and says it ought to be framed and hung up in the chamber of every king and every statesman; and, let us add, this feature of our Constitution should be so placed in every legislative hall in this country, that every member could not help reading it before taking his seat to do his work of legislation. Whenever legislative enactments of this kind are passed, it is only a mode of rendering judicial sentences; or, it is a direct assumption by the legislature of judicial functions; it is doing indirectly what Congress is prohibited from doing directly. As it is very justly termed in Menger vs. Dentler, 33 Penn. (9 Casey) Repts. 495, "*it is a decision not of the case arising between the parties, as it ought to be, but of a case partly created by the Legislature.*" This authority is a strong one, and reviews the doctrine here contended for in a style truly worthy of the eminent judge who delivered the opinion. There is not an evil in legislation more heartily condemned by our courts than this, and no language is spared to properly stamp it with disfavor by the judiciary. And it is necessary here only to refer the court to some of the leading cases in which this whole subject is discussed, and the question fairly and legitimately settled. (Hoke vs. Henderson, 4 Dev. (N. C.) Reps., 15; Jones vs. Perry, 10 Yerger (Tenn.) 59; Taylor vs. Porter, 4 Hill, (N. Y.,) 145–67; Brown vs. Hummell, 6 Penn., 86-91.) In this case from Pennsylvania, the whole doctrine is elaborately argued by the court, under a provision of the State constitution similar to the provisions of the fifth amendment to the Constitution of the United States. (1 Kent's Com., Lect. 24, note c., refers to the leading authorities upon the subject.) In the act now being discussed the party is tried, condemned, and his *property—his estate*

taken from him by the Legislature. If this be valid, our Constitution, made to restrict Congress, Executive, and all in authority, is a weak and supple thing in the hands of the legislative power; and, indeed, "it would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits." The English government is said to be a parliamentary government; adopt this legislation, and instead of a constitutional government, as we thought we had, we have at once a Congressional government. Harsh laws like this may strike some effective blows at treason, but we had better adhere to the forms and plans of the Constitution; for, like the execution of a notorious culprit by the expeditious process of a mob and lamp-post, instead of the formalities and delays of law and courts, it may be a very good thing for the community to have rid itself of the offender; but the way by which it was accomplished was a heavy blow at the very root of the tree of public and private security.

As being very closely and nearly allied to the act which deprives one of his *property without due process of law* is also bills of attainder, which Congress is prohibited by our Constitution from passing. In reviewing this provision of the Constitution, *Story* (2 *Com's, sections* 1343–4,) says, bills of attainder include bills of pains and penalties, because the Supreme Court has said, a bill of attainder may affect the life of an individual, or may confiscate his property, or both; and he refers to *Fletcher vs. Peck*, 6 *Cranch*, 138; 1 *Kent's Com's, Lect.* 19, *p.* 382. In the present case, the petitioner suffers the penalty of losing his practice in the courts of the United States because of his acts in the *rebellion*. What does the commentator say as to this? 2 *Story, Com's, secs.* 1343–4, thus disposes of the question: "In such cases the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. *In a free government it would be intolerable.*" This is unanswerable, and nothing more can be needed on this point. So much for the constitutionality of the act generally.

How does it stand as applied particularly in this case made by petitioner?

The petitioner was an attorney at law in the State of Arkansas for more than three years before his admission in this court in 1860. The conditions fixed by law in Arkansas

for attorneys are—the person must be twenty-one years of age; he must procure a license from a judge of the supreme court or circuit court; testimonials of good moral character must be furnished; an examination as to his qualifications must be had; and he must swear to support the Constitution of the United States and of the State, and faithfully to demean himself in the practice, to the best of his knowledge and ability. (*Gould's Dig., p.* 181.) The law of the United States (September, 1789) recognizes attorneys at law, and, under *rules to be prescribed* by the courts of the United States, admits them to conduct cases in those courts. The Supreme Court, pursuant to this law, adopted rule *No.* 2, heretofore noticed, which fixes the conditions upon which attorneys are to be admitted. Under this rule (No. 2) petitioner became an attorney of this court.

Without alluding to the difference in England between attorneys and solicitors, counsellors and serjeants, &c., it is sufficient to notice the position of those persons known as *lawyers, attorneys*, and to ascertain their rights and privileges as such. They are, however, called in England, as well as in this country, *ministers of justice, officers of the court;* 1 *Bacon Ab.*, 474, (*title Attorney;*) *Ib.* 506; and since the statute of 4 *Henry IV, c.* 18, it has been the practice in England, and it has always prevailed in America, not to admit attorneys at law without an examination as to their qualifications. *Tindal, C. J.*, speaking of the protection to which serjeants are entitled, says: "We think the warrant of the Crown can no more deprive the serjeant who holds an immemorial office of the benefits and privileges which belong to it, than it could alter the administration of the law within the court itself. (10 Bing., 571; 6 Bing., N. C., 187, 232, 235.) And in this country the rights of lawyers and attorneys are equally as well defined and protected. In the case of Austin et al., 5 Rawle Reps., 203, Gibson, C. J., says: "An attorney is an officer of the court; his office is one for life; the grant of an office without express limitation, at common law, being taken most strongly against the grantor, endures for the life of the grantee; and though this principle has not been applied to officers within the grant of the Executive, it must necessarily be applied to the office of attorney; for to subject the members of the profession to removal at the pleasure of the court would leave them too small a share of the independence necessary to the duties they are called to perform to their clients and to the public." Coming from the source this opinion does, as everything Judge Gibson uttered, it is entitled to the highest con-

sideration. In this case, the relative rights and duties of the bar and the court were fully and ably discussed, and the opinion then expressed has been time and again affirmed by different courts in the several States. (2 Cowen's Reps., 13; 20 Johnson, Reps., 492; Woods' Case, 1 Hopkins' Reps., 6; Leigh's case, 1 Munford R., 468.) *Sharswood*, in his Professional Ethics, p. 4, calls it an office clothed with many privileges, some of which are accorded to no other class or profession. *Warren*, in his Duties of Attorneys and Solicitors, p. 263, *et seq.*, speaks of attorneys being officers charged with the most sacred trusts; a profession which "employs in its theory the noblest faculties of the soul, and exerts, in its practice, the cardinal virtues of the heart." All agree, that in this country there is no trust higher or more vital than that of an attorney. There is no interest, of a public or private nature, which does not first or last pass under the scrutiny and examination, and often the direction, of this class of men. They almost fashion and mould that great arbiter in a free government, public opinion. They have their rights and privileges, to be enforced by legal process; they can compel admission to practice by mandamus; they can enforce their liens for fees; they are privileged from divulging secrets committed to them in their professional capacity; they are under the especial protection of the courts of which they are officers. With all this, their conduct for decorum, fair-dealing, and straightforwardness, in their transactions with their clients, is closely watched by the courts. Even in the early history of Rome, one of the oldest laws of which any fragment remains, declared the *patron* who injured his client a sacrifice to the gods—"*Sei patronos clienti fraudem faxit sacer estod*," *De Leg., Rom., cap. ii.* And everywhere, differing, may be, in degree, where the law is recognized as a science and a separate profession, these rights and duties have been established and upheld. In the United States it has become almost a proverb, that the law is the great highway to honor, fame and wealth. And in no country in the world is the law so generally a study; or is the profession more numerous and powerful. So striking is this fact, that *Mr. Burke* alluded to it in one of his speeches in Parliament, in which he said nearly as many copies of *Blackstone* were sold in America as in England. (1 Burke's Works, 188.) This has been remarked also by others; (Lyell's Second Visit to the United States, 1849, vol. 1, p. 45; 1 Buckle Hist. Civilization in England, p. 174.)

For delinquency, contempt, or corruption, the court can

strike them from the rolls, and prohibit them from practicing. This is a right inherent in the court, and no one disputes its existence. But even then, as all the authorities show, the party must have notice, and an opportunity to defend. If then these *lawyers or attorneys* are officers or ministers of justice of the court, I am at a loss to know how Congress or the Legislatures can deprive them of their commission or license, or their right to practice! The Constitution fails to give Congress any power to reach, or interfere with the officers of this court. This court, in its sphere, is as potent as Congress in its sphere. It is no part of the legislative duty to say who shall practice law, or who shall not. In fact, Congress, by act of 1789, says the Supreme Court may prescribe the rules for admission of attorneys. The court has done so. Petitioner is an attorney under that rule, and there is no warrant in the Constitution for Congress to say he is not, or he shall not be; which it does say by attempting to force him to take an oath which he cannot take; and therefore must lose his right in this behalf. If it be replied the party is not deprived of his right, but only put to another test, it is suggested that the very test defeats the end in view. It is as if a friend should invite his neighbor home to dine with him, and instead of giving him food, poisons him. In truth it is worse, for here the party is deprived of his right to practice, or his soul is poisoned and murdered by perjury.

It cannot advance the position that the law is constitutional, because this oath is but an additional qualification; for two reasons. Qualifications relate solely to the *fitness* or *capacity* of the party, and has nothing to do with his swearing to the one fact or the other. Many men are well and thoroughly qualified to practice law who never took an oath at all. When we say a man is qualified to practice law, we mean he understands his profession sufficiently well to discharge the duties of that profession. If oaths add to the qualifications of an attorney, it is supposed that he who takes the most and the longest oaths is best qualified. Now, I undertake to say, that a person might take all the oaths prescribed by every civilized government on earth, and the one discussed besides, with as grand solemnity as oaths are administered in Scotland, and he would be no better qualified to practice law than if he had not sworn at all. But the curious feature of this is, if it be a qualification, it is such as cannot in the nature of things attach. it requires the party to possess a qualification he cannot possess. It is much like

the interesting story that old people have amused children with from time immemorial, "that if they go to the end of the rainbow, they would find a bag of gold." One is as possible as the other. It is a familiar and unquestioned rule, that where there is a grant made, any words or conditions contained in the grant that would defeat it are void. Here the law permits the party to practice. This is granted. But upon conditions that defeat the right to practice. This law then destroys itself—*it commits suicide!*

But it is not an additional qualification, because attorneys, although officers of the court, are not officers of the United States, either by election or by appointment. Licensed by the court, they are amenable to the court for their conduct. Just here I apprehend some confusion has arisen on this subject. When *Chief Justice Marshall*, in *McCulloch vs. Maryland*, 4 *Wheaton*, p. 416, said, Congress might superadd to the oath directed by the Constitution such other oath of office as its wisdom might suggest, he had reference, not to lawyers, but to officers, strictly speaking, in the constitutional sense of the word, such as, being elected or appointed, receive commissions of office. The same great authority, in 9 *Wheaton*, 531, held attorneys to be but officers of the court, and responsible to them alone, as we have already abundantly seen. By the most latitudinous construction this decision cannot be made to reach attorneys. The question arose and was decided upon an entirely different state of facts, and relative to an officer within the meaning of the Constitution; and the simple statement of this question is argument enough.

Relative to these oaths, generally, it may be said, they are repugnant to the principles of our Government, and our whole system of jurisprudence. Really the very common practice of administering oaths upon almost every occasion has nearly brought down what was intended to be a serious and impressive ceremony to a mere irreverent form. The unconcern, even levity, with which the Diety is invoked almost daily in the oaths administered is alarming, and is well calculated to make one shudder when he thinks calmly of it. All laws of this kind but furnish men an additional temptation to treat lightly oaths that ought to be solemn indeed, if not to commit perjury outright. And when we reflect that our Government, for more than seventy years, travelled with a giant's pace and a giant's power to unrivalled prosperity without all these tests, until really, like the gnomon upon the sun-dial, we only counted the hours that

were serene, what benefit can we expect from these oaths? None on earth. And before they are made and received as part of the law of the land, they should be tried by every possible standard. They are innovations too sudden and too marked to receive the approval of the courts at once.

The law, however, is invalid for another strong and conclusive reason. The petitioner entered this court with the understanding and guaranty in fact that he would be protected in his rights here—his qualifications were then adjudged, and they then attached, and under the contract that the court would secure his rights, he entered upon his duties, received compensation, and gave advice, and rendered services in this court. The grant to him then received and accepted was perfect and complete, and Congress could not in the least limit it, or in any manner interfere with it. As has been seen by the authorities already cited, the license to practice is a grant. There is no room for doubt as to this position. And we have seen it is a grant of a substantial and valuable property—as was well said by Chancellor *Waters* in *Byrne's adm. vs. Stewart's adm.*, 3 *Desaus*, (S. C., 478;) the *lawyer's profession is his property*. The law is their profession, and by it they (lawyers) make their living—it is to them their "*meat, drink, and lodging*," and in this particular case it is fully shown, that in a pecuniary point of view the right to practice in this court is one of great value to petitioner. But when the court shall reflect, that after four years' search for his "rights in the territories," and he loses his rights in the States, and has nothing left but his profession by which to live, it is useless to say to the court that his profession is his property. It is a property without which petitioner would be now the most dependent of beings, and the portion of it connected with this court is of great value. Then this property was guaranteed to him by his admission in this court—and he is as much entitled to protection in its use and enjoyment as any citizen is in any property he may have or claim. Notwithstanding the *rebellion*, petitioner has never in law yielded his allegiance to the United States Government; nor, therefore, did he forfeit his right of protection, only as any other citizen when tried and convicted under the Constitution as before seen. It will not do for the United States to hold that allegiance was withdrawn, and protection forfeited. Although these might not for a time be enforced, yet it was only a temporary suspension—a kind of political *syncope* and there is no other ground for this Gov-

ernment to occupy as to all who were engaged in the *rebellion*. If, then, there be a contract capable of being enforced, which is true as already shown, did not Congress abridge and impair that contract by passing a law which added conditions to it not existing at the time it was made and entered into? Even if this oath be an additional qualification, Congress could not make it, because the thing was done and beyond its reach. If Congress can thus interfere with the contract to-day, it can to-morrow, the next day, or the next week, and the attorney may, in this way, never know his status, or his rights. It is said in (Evans *vs.* Eaton, Peters, C. C., Reps., 322,) that the prohibition in the Constitution against the States passing laws impairing the obligation of contracts does not attach to Congress. This is very true, but it was never dreamed by any one that such an inhibition as to Congress was necessary, for the powers of Congress being purely delegated powers, it was understood Congress would not do anything unless the power was delegated, or it could be implied from a power granted; and because this power is denied to the States, and not delegated to Congress, and the powers of Congress being purely delegated powers, it has always been held, that Congress could no more impair the obligations of contracts by enactments than could the State legislatures. Mr. *Madison*, one of the founders of our Government, and certainly one of the wisest of political sages in this or any other country, so held explicitly, at the time the Constitution was being discussed for ratification; (*Federalist*, by *John C. Hamilton*, p. 351;) and years afterwards, in his letters to *Judge Roane*, of Virginia, when removed from political strife, full of years and wisdom, he repeated in more forcible language, if possible, his views as expressed in the *Federalist* on this subject. He always held such laws as contrary to the spirit and meaning of our Constitution. It was always thought that the great National Congress would never attempt to pass laws of this character, and therefore, from the very nature of the case, like parricide in the Athenian law, the Constitution made no such prohibition as to Congress. That the contract here spoken of is such as comes within that clause of the Constitution; See Smith's Com., 250; Story on Const., Sec. 1378; and this law, by abridging the rights—adding conditions not made in the contract, &c., does violate and destroy the contract. (See Story on Const., sec. 1385, and Notes.)

But, if instead of being an additional qualification, this law is in the nature of a penalty and, therefore, a prohibi-

tion, it is certainly void, as it undertakes to annul contracts already executed. The license has been given and accepted, and the party has used it and profited by it, and wishes to continue in its use. If it be agreed Congress can pass such laws as to executory contracts, which is not true, assuredly it will not be claimed as to executed contracts. If Congress itself grant lands to certain persons, and that grant be accepted, although voluntary, it is forever beyond the reach of Congress. The grant may be set aside and canceled by direct proceedings in the proper court, for certain reasons, but no law of Congress can touch it. Mr. Madison once used this forcible language, and the principle advocated by him applies here: "A grant of land to an individual may be of *favor*, not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favor, but the pardon is not on that account the less irrevocable." This rule applies to all grants or contrcts, whether by the sovereign, by Congress, by individuals, companies, or corporations. (2d Spence Eq. Jurisdiction, 885; 2 Greenleaf's Cruise, 532.) And so this court ruled in the celebrated *Mariposa grant*, 17 How., 558. This is such a grant, too, without limitation, as *Chief Justice Gibson* said, *in Austin's case, sup.*, as is taken most strongly against the grantor; and the opinion of *Tindal*, cited above, comes in play here again. The Supreme Court, according to its rights and authority, licensed petitioner, and he received and accepted, used and enjoyed, the license; and now, by prohibition of Congress, he is to forfeit this grant. The powers of Congress are as great, or greater, than those of the English Parliament, if this can be done. And upon this issue, the independence of the judiciary itself is involved directly, and more too, if possible, the life of the Constitution itself is at stake. It is not to be wondered at, that all the writers upon republican governments like ours, have expressed the fear that the greatest danger of transgressing their proper bounds is on the part of the legislative branch, rather than either of the other two; and this is so from the very nature and character of the government, without any desire on the part of that branch to go beyond its sphere. It is only a happy consolation that we have a judiciary, in the last resort, to put these great questions in the crucible, and try theirs trength and genuineness.

And it is here submitted, that, as relates to the rights and privileges of the petitioner in this court, the law in question most palpably violates the Constitution under which we live, move, and have our political being.

The Effect of the Pardon.

On the 15th day of July, 1865, the President of the United States granted petitioner a "*full pardon and amnesty for all offences by him committed in the rebellion, direct or implied.*" The pardon is presented as an exhibit with the petition. Both words, *pardon* and *amnesty*, are used in the pardon here; pardon meaning *a remission of guilt;* amnesty, *an act of oblivion or forgetfulness.* So if there be any difference between the words in their effect, petitioner has the benefit of both. The pardon has been granted, accepted, and pleaded to civil and criminal proceedings, and recorded, and judgment rendered on the plea in favor of petitioner, as the record here shows. So all benefits, as far as can be, have been claimed by petitioner, and the pardon, is now, in his case, operative. (1 Burr's Trial, by Robertson, 191; and authorities cited by Mr. Martin; Wilson's case, 7 Peters, 150; and the opinions of Mr. Crittenden and Mr. Cushing, cited above.) All has been done that he can do, and all penalties are removed except the one here sought to be got rid of. I take it, had I not acted in aid of the *rebellion*, I could take the oath; and not being able to take the oath is a consequence of the offences committed in the rebellion; all of which, "*direct or implied*," are pardoned. Judge *Marshall* said (7 Peters, sup.) we had to look to the law in England for the effects of pardon in this country.

In 2d Sharswood's Blackstone, 402, it is said: "The effect of a pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains a pardon; it gives him a new credit and capacity; and the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander for calling him a traitor or felon." (See 7 Peters, Sup., Opinions Att'y Gen'l, cited above; 18 Howard, U. S., 307.) This law fixing the oath, as is more than sufficiently argued already, creates a penalty and adjudges a forfeiture in the strictest sense of the word. *Mr. Hay*, U. S. Dist. Attorney, in the prosecution of Burr, speaking of the pardon of Bollman, said: "It completely exonerated Bollman from *all* the penalties of the law." (Burr's Trial, Sup.)

The maxim for a long time was: "*Pœna potest tolli, culpa perennis erit;*" but this has long since been exploded, and now it is held everywhere that both the crime and punishment are wiped out. 7 *Bacon, ab.*, (title Pardon, D. p., 412,)

says, "The stroke being pardoned, the effects of it are *consequently* pardoned;" and refers to Cole's Case, Plowden, 401. Same authority (415–16, Notes A and B) says: "The pardon removes all punishment and legal disability." (See too, Gilb. Ev., 128; 2 Bulst, 154; 1 Sid., 52; 2 Russell on Crimes, 596, 2d edition, note E.) Pardon prior to conviction shall prevent all forfeiture of lands and goods. (2 Russell, 418.) We have seen what forfeiture means, and there is a forfeiture here. Corroborative of these positions, the court is referred to Crosby's case, 12 Howell, St. Tri. p. 1296, by Lord Holt; Reading's case, 7 ib, 296, Ch. J. North, in which it was adjudged that pardon removed punishment and objection to competency, &c. (See Lord Warwick's case, 13 St. Tri. by Howell, 1005; and Ambrose Rukewood's case, ib. 183.) Where a crime is pardoned, all the consequences thereof are discharged. (Rex. vs. Groenvelt, 12 Mod., 119.)

The following strong language is used in 1 Bishop's Cr. Law, sec. 713: "The effect of a full pardon is to absolve the party from *all the consequences* of his crime, and of his conviction therefor, direct and *collateral;* it frees him from the punishment, whether of imprisonment, pecuniary penalty, or *whatever else the law has provided.*" Here the law has provided, in legal effect, petitioner cannot practice in the Federal courts because he aided in the *rebellion;* and for this act the President has pardoned him! *Bishop* is held good authority —at all events, he refers to cases of long standing, and which have never been overruled. Among others, there is a strong case from New York, (Deming's case, 10 John, Reps., 232, 483,) and this case is strictly applicable to the point made here. People vs. Pease, 3 Johns' (N. Y.) cases, 333, is a case in point. This has much to say upon conditions of pardons, and adjudges conditions inconsistent with the full pardon to be void. Such is the law as to all grants, as before argued here. *Mr. Speed*, Pamphlet Opinion, 1st May, 1865, p. 6, says: "The conditions appended to a pardon cannot be inconsistent with the pardon." And if, after granting the *full* pardon to petitioner, it had recited a condition that he could not practice in the Federal courts, it is apprehended that condition would have been void for inconsistency; and the court will find Pease's case, sup., favoring this view.

The conditions annexed to the pardon granted are all right and proper, and it is submitted that, without them such would have been the legal effect of the pardon; for as to the costs, the President could not release them, for they were going to other and different parties. And upon the old maxim "the

king cannot be bountiful to the injury and damage of other persons—he cannot grant favors with what is not his own," the costs in the proceedings against the person and property of the petitioner were beyond the President's control. (See State *vs.* Anglea, 10 Grattan, Va.; State *vs.* Farley, 8 Indiana.) Mr. *Grundy*, while Attorney General, in 1839, intimated the President could remit costs in criminal cases. (3 Andrews' Opinions, p. 418.) But it may be taken as settled that costs cannot be released by pardon of the Executive, and this is held by Mr. *Crittenden* and Mr. *Cushing* in the opinions cited before.

We have seen, in the first part of this argument, that the power of pardon is unlimited, and cannot be abridged by Congress. But Congress does abridge it by the law here in question;—that law then is void.

We have seen, too, that a pardon is a grant, to complete which it must be accepted; (7 Peters, *sup.*;) and when that grant is complete, like all other grants, Congress cannot rescind or cancel it. But Congress, by this law, does cancel, to a certain extent, a pardon granted, accepted, and pleaded by the party; therefore, again, that law is void.

This branch of the case will be surrendered by quoting some passages from the opinion of the constitutional adviser of the President, (Mr. Speed,) in his opinion to him, on 1st May, last, p. 7: "As an act of grace freely given, it (the pardon) should be liberally construed in favor of the repentant offender." "After the pardon has been accepted, it becomes a *valid* act, and the person receiving it is entitled to all its benefits." (*Ib.* 12.) "The grace and favor of the Government should ever be large and generous, and the *operation* and *effect* of its proffered mercy should not be left uncertain." "Persons who have been constantly engaged in rebellion should know distinctly what they are to do, when and how to do it, to free themselves from punishment, in whole or in part, *or to reinstate themselves as before the rebellion.*" (*Ib.* 11.)

The President, by Proclamation of 29th May, 1865, proffered pardon to offenders in the *rebellion;* and, as one of these, petitioner came, and he received pardon; he complied, as the record shows, with its conditions; his pardon remits the guilt, and all its consequences; in other words, pardon means *pardon*; as condonation in law wipes out the offence, and its results, and the offence and results are forgotten—is all this not sufficient? What more can he do, or ought he to be expected to do? It does look as if he had done enough,

notwithstanding the oath prescribed by Congress, and without being punished for these offences, for which he was pardoned, by forfeiting his right to practice in this court, to freely and completely "*reinstate himself as before the rebellion.*"

The Tax upon Lawyers!

By act of Congress, of June 30, 1864, lawyers were taxed for the purposes of internal revenue, &c. Petitioner has paid his tax to the proper officer and received his license. Under this however, he is not allowed to practice in the Federal courts. Already he is an officer of the courts of Arkansas by permission of her laws, which have heretofore been referred to. Petitioner practices law in the courts of Arkansas by her laws, and not by laws of the United States. Taxation by the Government and something given in return by the Government to secure that which is taxed, is the received idea in the United States. If the United States should say, for every person who practices law in the Federal courts a tax of so much should be paid, then the idea is perfectly consistent and intelligible. But it is not so plain by any means, nor so consistent, that the United States can tax lawyers for simply practicing in the courts of their respective States, and then prohibit them, or certain of them, from practicing in the Federal courts. There seems to be no *value received* or *quid pro quo*, in this transaction. *Chief Justice Marshall* in *McCulloch vs. Maryland*, said: "the sovereignty a State extends to everything which exists by its own authority, or is introduced by its permission." This case is now looked upon as a commentary on our Constitution, and the great mind that conceived that opinion was not what is termed a *strict constructionist*, nor in favor of strict *States Rights*. As lawyers in Arkansas courts exist by authority of Arkansas, it does not seem reasonable that the United States could tax them; or, if taxing them, should interpose barriers to their practicing in the Federal courts that amount to an absolute prohibition. Therefore, it is insisted that either one or the other of these laws, (the test oath law and the tax act,) should give way. Lawyers, doubtless, are willing as they should be, to pay taxes for the privilege of practicing in the Federal courts, and such a law would certainly be constitutional, and the test oath law in my opinion is not; and it is with some degree of confidence that I look for the judgment of this court declaring the act of Congress prescribing this oath null and void.

The above positions, and reasons for them, are now submitted to the court. This argument is long, probably too long, but the question is one of national importance, and the duty of this court to pass upon the constitutionality of an act of Congress, is at all times a very delicate one; therefore when such questions are presented, no pains should be spared to discuss them freely, fairly, and at length. There are some novelties in some of the questions. They have been argued with an anxious desire to avoid all questions of a political character, and to rest the decision entirely upon law, and legal considerations; and it is earnestly hoped this much has been accomplished. The question ought to be settled, and although its solution may be much to me, yet the country at large has a deep and almost vital interest in it too. In this noble form of Government of ours, one of its noblest features is the right of the judiciary at last to pass upon laws enacted by Congress, and signed by the President. And whatever may be the troubles and agonies of the hour, from passion, enmity, party contention, and hasty or unwise legislation, I always look forward to this ultimatum in our Constitution, as the salvation of our rights and liberties. In this tribunal, finally, rest the liberties of the people of this country, and for one I say it is well it is so. While I value my right to appear in this court, for its pecuniary benefit, and because it is a pleasure and instruction for me to come annually to the national temple of justice, to hear its oracles speak, and while I regard the law under consideration as violative of some of the most sacred safeguards of the Constitution, yet should the court differ with me, and adjudge the act valid, as I always respect and obey the judgments of the judiciary from a sense of right and duty, none will yield more gracefully than I to its mandate, however severely it may affect me.

Very respectfully submitted,

A. H. GARLAND.